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IN THE

# Supreme Court of the United States

No. 16, Original, October Term, 1927.

THE STATE OF COLORADO, *Complainant*,

*vs.*

THE STATE OF KANSAS AND THE FINNEY COUNTY WATER USERS' ASSOCIATION, A CORPORATION, *Defendants*.

## SUPPLEMENTAL BRIEF FOR DEFENDANTS ON THEIR MOTION TO DISMISS THE BILL OF COMPLAINT IN EQUITY AND THE CASE.

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IN THE

# Supreme Court of the United States

No. 15, Original, October Term, 1927.

THE STATE OF COLORADO, *Complainant*,

*vs.*

THE STATE OF KANSAS AND THE FINNEY COUNTY WATER USERS' ASSOCIATION, A CORPORATION, *Defendants*.

## SUPPLEMENTAL BRIEF FOR DEFENDANTS ON THEIR MOTION TO DISMISS THE BILL OF COMPLAINT IN EQUITY AND THE CASE.

The purpose of this is to present extracts from some of the briefs and from an oral argument in the case in this Court of State of Kansas, Complainant, vs. State of Colorado et al., Defendants, the United States of America, Intervener, No. 3 original, decided May 13, 1907, reported in 206 United States, page 46.

## IN KANSAS VS. COLODARO, EACH STATE ASSERTED THERE WAS IN THAT CASE NO ISSUE AS TO PRIORITY BETWEEN INDIVIDUAL WATER APPROPRIATORS ON OPPOSITE SIDES OF THE BOUNDARY LINE BETWEEN THE TWO STATES.

The brief, on final hearing for Complainant, for the State of Kansas, in the case of Kansas vs. Colorado, is bound in Vol. 4, Transcript of Records and File Copies

of Briefs 1906, Office of the Supreme Court of the United States. The following quotation is from pages 236-238 of the brief for the state of Kansas on the final hearing:

"The state of Kansas has a vested right in the system of irrigation in western Kansas, and may maintain and protect such system, affecting a large part of the territory and a great number of its citizens, by any appropriate action.

"Between the years 1879 and 1888 an irrigation system grew in the Arkansas Valley in western Kansas. Eight different corporations were chartered by the State of Kansas between October 8, 1879, and November 29, 1887, and these companies were organized for the purpose of irrigating the bottom lands along the Arkansas river between the state line and Kinsley. These corporations were referred to in Section 14 of this brief, and the dates of their charters were there given, and the evidence shows that within two or three years after the corporations were chartered the ditches were constructed and the water was turned in and used. A few other and smaller ditches were also constructed by private individuals. The charters of all these corporations were introduced in evidence as exhibits Nos. 13, 46, 47, 48, 48½, 49, 49½, 54, 54½. These corporations are still in existence, and operating under the laws of the state of Kansas.

"The state of Kansas has passed a number of laws for the protection of the system of irrigation suited to this part of the state of Kansas. This irrigation system was built up with the consent and under the control of the State of Kansas, and in that system the state of Kansas has now a vested legal and constitutional right, and such a right as can not be impaired or

interfered with by subsequent acts of any other state, or by the citizens of any other state. The acts of Colorado and its citizens who are the defendants in this case, of which we complain, were all subsequent to the establishment of this irrigation system in the five western counties of Kansas through which the Arkansas valley extends. In fact, it was from this system in Kansas that Colorado and her citizens conceived the idea of successful irrigation in the Arkansas river. Their system has grown as ours has diminished. The success of their system has been the destruction of ours, and their prosperity is built upon our misfortune. The water of the Arkansas river was used within the boundary of Kansas many years prior to the depletion of the river west of the state line by the defendants in this case. By the enhancement of the value of these lands the state of Kansas derived a great and increasing revenue from taxation, and in these taxes the state of Kansas has a vested right inuring to its benefit long prior to the depletion of the river by the defendants in the state of Colorado.

"In this case the state of Kansas is not appearing for any individual, or any corporation, for any ditch company, or for any individual owner of land under these ditches. The state of Kansas is not aiding any particular title nor any single right connected with any particular piece of land. It is not attempting to establish the exact date of a particular priority nor is it attempting to sustain the right of any individual or corporation to a particular amount of water that was used in any ditch for the purpose of irrigation. No such allegation as that is found in the bill and no proof was introduced in evidence to sustain any such claim. The state of Kansas on the contrary, however, appears as

*parens patriae*, guardian or trustee of all these interests which have been vitally affected or wholly destroyed. The state of Kansas has a prior and vested right in this whole system extending through five counties, including more than two hundred thousand acres of land, profitably employing many thousands of its citizens and yielding an annual revenue that helps to sustain its institutions and pay its expenses. The injury to this irrigation system is a real legal and well-founded injury and for which the state of Kansas has the right to seek relief in this court and in this case."

The next quotation is from the brief on behalf of the state of Colorado on the final hearing in the case of Kansas vs. Colorado, which is bound in Vol. 5, the Transcript of Records, 1906, and appears at pages 296-297.

"2. Entirely independent of the considerations set forth in the preceding section of this argument, it may be said that under the evidence produced in this cause it is impossible to find any 'vested right' in individual appropriators which is shown to have been injured in any degree by actions of the defendants or any of them.

"In a certain vague way the complainant claims that the state of Kansas has a vested right in the system of irrigation in western Kansas, but the complainants brief expressly says, 'The state of Kansas is not aiding any particular title, nor any single right connected with any particular piece of land. It is not attempting to establish the exact date of a particular priority, nor is it attempting to sustain the right of any individual or corporation to any particular amount of water used in any ditch for the purpose of irrigation. No such allegation as that is found in the bill, and no proof was introduced to sustain the claim.' (Pl. Br. 238.)

"In the absence of both allegation and proof on this subject this Court surely cannot find as a matter of fact that any 'vested right' existed in any Kansas ditch owner which can here be asserted as against the defendants."

In Vol. 5 of the same Transcript of Records, in Kansas vs. Colorado, there are some answers by Mr. Clyde C. Dawson, of counsel for Colorado, to questions propounded by the court in ruling on the demurrer of Colorado. These answers are recited as being given in the oral argument on the final hearing. We quote from page 2 of these answers:

"#3rd. Whether certain persons and corporations of Colorado must be made parties here? The question has in part been answered by the complainant making in the amended bill various corporations in Colorado parties defendant and if the complainant seeks any decree in this case which shall attempt to adjudicate any rights as between ditch owners in Kansas and Colorado then we believe it is clearly established by the evidence that still other persons and corporations both in Colorado and Kansas will be necessary parties to this suit and that the bringing in of such persons would oust the jurisdiction of the Court, if that has not already been done by the bringing in of the corporation defendants."

The last quotation also appears at page 229 of the oral argument at the final hearing bound in Vol. 5 in the same Transcript of Records, 1906, in the case of Kansas vs. Colorado.

At page 227 of the oral arguments in Vol. 5 Transcript of Records, 1906, Mr. Clyde C. Dawson, of counsel for Colorado, said:

"I will say practically nothing as to the Kansas

ditches. Neither in the bill nor in the amended bill filed by Kansas in this case were they mentioned. One will search these documents in vain to find any claim based upon the theory of appropriation or upon the fact that any ditch had ever been built in Kansas.

"We heard but little of the Kansas ditches until counsel reached western Kansas in the examination of their witnesses in rebuttal. We had a right to assume that they based nothing upon that, because at page 5 of the arguments by Mr. Ware, filed on the demurrer by Kansas in this case, he says, 'We are not asking that a ditch be closed in Colorado in order that one may be opened in Kansas. We are only asking that sufficient water be permitted to flow in our river to fertilize our fields in a natural way.'

"That is what they said in their brief upon this matter, so I will leave that to my friend who represents one of the great ditch owners, if he cares to say anything upon this subject which is absolutely foreign to the complaint in this case."

We quote the following from the "Brief of the State of Colorado in reply to the Brief of Intervener." The Intervener was the United States of America. That brief is bound in Volume 5 of the Transcript of Records referred to. We quote from pages 32 and 33:

"The Intervener asks this court to announce a doctrine to the effect that he who is prior in time in the actual appropriation of the water, and continues to apply the same, is prior in right, *irrespective of state lines*, and irrespective of ownership, riparian or otherwise, if within the water shed of the streams from which the water is drawn. Intervener's Brief 202.

"We respectfully submit that the question as to relative rights of appropriators of the waters of an inter-

state stream having lands in different state jurisdictions is not now before this court. It is not brought into this case by the state of Kansas by its bill, for in that bill any right based on priority of appropriations is distinctly repudiated. If we should ignore the defect in the bill and look to the evidence as to the Garden City ditches, we shall find that even then there is no situation of fact which invokes a decision by this court. See our discussion as to Kansas ditches. (Colorado Brief pp. 198-214)".

And from page 34 of the brief for Colorado, in reply to the Intervener:

"It may well be that in a controversy between individual appropriators on opposite sides of a state line, but on the same stream, the question of relative right may properly be the subject of judicial cognizance and decision, but in any such case all the facts and circumstances which go to control the extent and character of the rights asserted must be presented before a sound decision can be made."

And from page 36 *id.*:

"In view of these decisions affecting the subject of interstate control of waters used for purposes of irrigation, we respectfully submit that the case at bar does not justify or permit the announcement of any rule upon this subject of relative rights of appropriation on the opposite sides of the state line, and that the question must await either further legislative action or constitutional amendment, as hereinabove suggested, or be left for a decision in a specific case involving individual rights under the particular conditions and circumstances which may be at the time of presenting to the Court for decision."

## QUOTATIONS FROM AND REFERENCES TO KANSAS STATUTES ON THE SUBJECT OF IRRIGATION.

### GENERAL STATUTES OF KANSAS 1868.

### CHAPTER 23.

### CORPORATIONS.

"Sec. 4. Private corporations may be created by the voluntary association of five or more persons, for the purposes and in the manner mentioned in the following sections of this article."

"Sec. 5. The purposes for which the private corporations, mentioned in the last section may be formed are: * * * Thirty-fourth, The construction and maintenance of canals for the purposes of irrigation or manufacturing purposes." (Pages 191-192 id.)

"Sec. 89. Every canal corporation, for the purpose of irrigation, shall, in addition to the powers heretofore conferred, have power: First, To cause such examination and survey for its proposed canal to be made as may be necessary to the selection of the most advantageous route, and for such purpose, by its officers, agents or servants, to enter upon the lands or waters of any person. Second, To take and hold such voluntary grants of real and other property as shall be made to it to aid in the construction and maintenance of its canal, ditches and sluices. Third, To lay out a canal, not exceeding fifty feet in width, and to construct the same; and, for the purpose of cuttings and embankments, to take as much more land as may be necessary for the proper construction and security of the canal or any of its branch ditches or sluices. Fourth, To construct its canal across, along or upon any stream

of water. Fifth, To furnish water for irrigation at such rates as such organization or corporation may by its bylaws and regulations prescribe. Sixth, To borrow such sums of money as may be necessary for completing and finishing or operating their canal, and to issue and dispose of their bonds for any amount so borrowed, and to mortgage their corporate property and franchises to secure the payment of any debt contracted by the corporation for the purposes aforesaid: Provided, That damages for any property appropriated by such corporation shall be assessed and paid for as is provided for in case of railroads." (Pages 214-215 id.)

## SESSION LAWS OF KANSAS 1876.

### CHAPTER 58.

### CORPORATIONS—IRRIGATING OR HYDRAULIC.

"An Act amendatory of chapter sixty-four of the laws of 1871, and supplemental to article nine, chapter twenty-three, of the general statutes of 1868."

"Be it enacted by the Legislature of the State of Kansas:

Section 1. That section eighty-eight of an act concerning private corporations, passed and approved February twenty-ninth, eighteen hundred and sixty-eight, as amended by chapter sixty-four of the laws of eighteen hundred and seventy-one, be further amended so as to read as follows: Section 88. Lands may be appropriated for the use of a macadam, plank road, telegraph, hydraulic, irrigating corpora-

tions in the same manner as is provided in this article for railway corporations, as far as applicable, and any hydraulic or irrigating corporation desiring to conduct water in pipes, canals or raceways, or transmit power by shafting, belting and pulleys, or ropes and pulleys, may obtain the right of way for such pipes, canals, raceways, shafting, belting and pulleys, and ropes and pulleys, in manner as aforesaid; and such pipes, canals, raceways, shafting, belting and pulleys, or ropes and pulleys, may be laid through or over any lands or lots, or along or upon any stream of water, using so much of the water thereof as may be needed for the purposes for which the corporation was organized, or through any street or alley or public ground of any city of the second or third class: Provided, That no such canal shall be located through any street or alley or any public ground of any city without the consent of the municipal authorities thereof: Provided further, That it shall be unlawful for any corporation or person to locate or construct any irrigating canal along or upon any stream of water, or take and use the waters of any stream in such manner as to interfere with or in any wise hinder, delay or injure any milling or irrigating improvements already constructed or located along or upon any stream or water, or to diminish the supply of water flowing to or through any established irrigating canal.

"Sec. 2. That any hydraulic or irrigating company, organized under the laws of this state, may furnish sell or lease, for such time as it may determine, any portion of its water or power to any person who may wish to use the same, and may convey water in pipes or canal, and may transmit power by shafting, belting and pulleys, or ropes and pulleys, and may borrow

such sums of money as may be necessary for completing and finishing or operating its canals, pipes, dams, mills, or machinery, and may issue and dispose of its bonds for any amount so borrowed, and may mortgage its corporate property and franchises, or any part of the same, to secure the payment of any debts contracted by the corporation for the purposes aforesaid.

"Sec. 3. The original section one, chapter sixty-four of the laws of eighteen hundred and seventy-one, is hereby repealed.

"Sec. 4. This act shall take effect and be in force from and after its publication in the Kansas Farmer.

"Approved March 4, 1876." (Pages 153-154 id.)

## SESSION LAWS OF KANSAS 1886.

### CHAPTER CXV.

### IRRIGATION.

### AN ACT CONCERNING IRRIGATION.

"Be it enacted by the Legislature of the State of Kansas:

"Section 1. The right to the use of running water flowing in a river or stream in this state, for the purposes of irrigation, may be acquired by appropriation. As between appropriators, the one first in time is the first in right.

"Sec. 2. Any person, company or corporation entitled to the use of water may change the place of diversion, if others are not injured by such change, and may extend the canal, ditch, flume or aqueduct by which the diversion is made to places beyond that to where the first use was made.

"Sec. 3. Any person, company or corporation de-

siring hereafter to appropriate water, must post a notice in writing at a conspicuous place at the point of diversion, stating therein: First, That such person, company or corporation claims the water there flowing to the extent of————(giving the number of) inches, measured under a four-inch pressure, and describing and defining as accurately as may be the place of diversion; second, the means by which such person, company or corporation intends to divert it, and the size of the canal ditch, or flume, or aqueduct, in which he intends to divert it. A copy of such notice must, within ten days after it is posted at the place of diversion, be also posted in a conspicuous place in the office of the county clerk of the county in which such place of diversion is situated, and be recorded by the county clerk in a book to be kept for that purpose.

"Sec. 4. Within sixty days after the notice is posted, the claimant must commence the excavation or construction of the works in which such claimant intends to divert the water, and must prosecute the work diligently and uninterruptedly to completion, unless interrupted by stress of weather. By completion is meant conducting the water to the place of its intended use. By a compliance with the above rules, the claimant's right to the use of the water relates back to the time the notice was posted. A failure to comply with such rules shall deprive the claimant of the right to the use of the water as against a subsequent claimant who complies therewith.

"Sec. 5. The county clerk of each county where water is appropriated for the purpose of irrigating lands, shall keep a book in which he shall record the notices provided for in this act, together with verified proof of the posting thereof.

"Sec. 6. Where any canal, ditch, flume, or aque-

duct, which is the property of any individual, company, or corporation, and is used for the purpose of irrigating lands, has been located or constructed upon or over any tract of land with the knowledge or consent of the owner of such lands, or upon or over any tract of land owned by the United States, and prior to the occupation of the same by any settler for the purpose of entry under any act of congress, such location and construction shall be prima facie evidence that the same was rightful; and such canal, ditch, flume or aqueduct shall be deemed and held to come within the provisions and protection of section one of chapter one hundred and thirty-four of the session laws of eighteen hundred and eighty-five: Provided, however, That such canal, ditch, flume or aqueduct shall have been constructed for a period of at least two years prior to the first day of January, A. D. eighteen hundred and eighty-six.

"Sec. 7. Any individual, company or corporation who has heretofore constructed any canal, ditch, flume or aqueduct for purposes of irrigation upon or over lands unoccupied at the time of such construction, who shall maintain the same for the period of five years succeeding such construction, without objection in writing from the owner of such land, or subsequent claimant under the laws of the United States or of the state of Kansas, shall after the expiration of said period of five years, be deemed and held to have acquired a permanent right-of-way for such canal, ditch, flume, or aqueduct, not exceeding, however, the total width of three times the width of such canal, ditch, flume, or aqueduct.

"Sec. 8. When any individual, company or corporation shall have constructed any canal, ditch, flume or aqueduct, for purposes of irrigation over unoccupied

lands of another, the damages awarded for the right-of-way of such canal, ditch, flume or aqueduct shall not exceed the value of the land occupied at the date of such construction, and neither the enhanced value of the land growing out of the construction of such canal, ditch, flume, or aqueduct, nor the subsequent enhancement of its value through settlement made after the construction of such canal, ditch, flume or aqueduct, shall be considered in estimating the damages for such right-of-way: Provided, Such canal was constructed with the knowledge and without protest from the owner of the land.

"Sec. 9. This act shall take effect and be in force from and after its publication in the official state paper.

"Approved February 19, 1886." (Pages 154-156 id.)

## SESSION LAWS OF KANSAS 1891.

### CHAPTER 133.

### IRRIGATION.

"An Act providing for and regulating the diversion, appropriation, storage, and distribution of waters for industrial purposes within prescribed limits and of the construction, maintenance and operation of works therefor; prohibiting unlawful use thereof or interference therewith; providing for the creation of irrigation districts having certain powers; fixing penalties for and assigning jurisdiction of offenses hereunder; defining the powers and duties of certain public officers; and for other purposes.

"Be it enacted by the Legislature of the State of Kansas:

"In the manner following; that is to say:

## ARTICLE 1.

## OF THE DIVERSION AND APPROPRIATION OF WATER FOR INDUSTRIAL USES.

Section 1. In all that portion of the state of Kansas situated west of the ninety-ninth meridian, all natural waters, whether standing or running, and whether surface or subterranean, shall be devoted first, to purposes of irrigation in aid of agriculture, subject to ordinary domestic uses, and secondly, to other industrial purposes, and may be diverted from natural beds, basins, or channels, for such purposes and uses: Provided, That no such diversion shall interfere with, diminish or divest any prior vested right of appropriation for the same or a higher purpose than that for which such diversion is sought to be made without the due legal condemnation of, and compensation for, the same; and natural lakes and ponds of surface-water, having no outlet, shall be deemed parcel of the lands whereon the same may be situate, and only the proprietors of such lands shall be entitled to draw off or appropriate the same.

"Sec. 2. The appropriation of water hereafter shall, in every case, be deemed and be taken to be accomplished and effectual only as to so much water as shall have been actually applied to beneficial uses within a reasonable time after the commencement of the works by means of which such appropriation is intended to be made, or afterwards where no appropriation has in the meantime been initiated by others, together with the reasonable amount necessary to supply losses by waste, seepage and evaporation; all the residue of the water within the capacity of the canal or other works shall be deemed to be derelict, and li-

able to appropriation by any subsequent appropriator.

"Sec. 7. Every person complying with the provisions of this act, and applying the waters obtained by means of any artesian well to beneficial uses, shall be deemed to have appropriated such waters to the extent to which the same shall be so applied within a reasonable time after the commencement of the works, and such appropriation shall have effect as of the day of commencement of such works, provided the same is prosecuted with reasonable diligence; otherwise, from the time of the application of the waters thereof to beneficial uses.

"Sec. 8. Any prior right of appropriation shall exist and continue only by the exercise thereof in a lawful manner, and any failure of such appropriator continuously to apply such water to lawful and beneficial uses, without due and sufficient cause shown for such failure, shall be deemed an abandonment and surrender of such right.

"Sec. 9. Every vested right of prior appropriation or diversion of water for industrial uses shall be subject as to the right of eminent domain, and may be condemned and compensated for, for public and beneficial uses, in the same manner and under the same restrictions and regulations as govern the condemnation of other private property." (Pages 223-226, id.)

This Act extends from page 223 to page 260 of the Session Laws of Kansas 1891. The headings of the articles after the first are as follows:

"Article II, Of the right of use of water." There are six sections in this Article.

"Article III, of right-of-way and site for works for appropriation and devoting waters to beneficial uses." There are five sections in this Article.

"Article IV, of the construction, maintenance and operation of works for appropriating and devoting waters to beneficial uses." There are 32 sections in this Article.

"Article V, of the disposal of seepage waters." There are two sections in this Article.

"Article VI." This Article vests power in the Board of Railroad Commissioners to fix upon complaint reasonable charges for water furnished by an irrigation company to users thereof. There are two sections in this Article.

"Article VII, of the creation of irrigation districts having certain powers." There are twenty-four sections in this Article.

"Article VIII, of unlawful interference with, injury to, or use of, works appropriating and devoting water to beneficial uses, or the water thereof; and of penalties therefor, and proceedings for the punishment of offenses respecting the same." There are twenty-five sections in this Article. (Pages 223-260 id.)

## SESSION LAWS OF KANSAS 1899.

### CHAPTER 95.

### RELATING TO RIGHT OF WAY AND LEASES OF CERTAIN CORPORATIONS.

Section 1 of this chapter amends Section 1 of chapter 85, Laws of Kansas, 1891, the same being Sections 1397 and 1398 of General Statutes of 1889. It provides, infer alia:

"Sec. 1397. Lands may be appropriated for the use of * * * irrigating * * * corporations * * * in the same manner as is provided in this Article for railway corporations, as far as applicable; and any

* * * irrigating * * * company * * * desiring the right to dam or take water from any stream, to conduct water in canals or raceways or pipes * * * may obtain such right or the right of way for all necessary canals, raceways, pipes * * * in the manner as aforesaid; and such canals, raceways, pipes * * * may be laid, carried or stretched on, through or over any land, or lot, along or upon any stream of water, using so much of the water thereof as may be needed for any of the purposes aforesaid, * * * provided further, that it shall be unlawful for any person or corporation to locate or construct any irrigating canal or raceway along or upon any stream of water, or take and use the water of any stream in such manner as to interfere with or in anywise hinder, delay or injure any milling or irrigating improvements already constructed or located along or upon any stream or water, or to diminish the supply of water flowing to or through any established irrigating canal.

Section 2 of this chapter 95, Laws of Kansas 1899, amends Section 1398 of the General Statutes of Kansas 1889 and provides, inter alia:

"That any * * * irrigating * * * company * * * may furnish, sell, let or lease, for such time as such corporation may determine, any portion of its water * * * to any person or persons, or corporation or partnership, who may wish to use the same, and may convey water in channels, raceways or pipes." (This chapter appears on pages 191-193 Session Laws of Kansas 1899.)

THE FOLLOWING QUOTATIONS ARE FROM THE REVISED STATUTES OF KANSAS, 1923:

Titles of the headings are given of the sections which are not quoted.

"17-202. Authority to incorporate. The purposes for which private corporations may be formed are:

"* * *—(Clause 37). The construction and maintenance of dams and canals for the purpose of waterworks, irrigation, or manufacturing purposes."

"42-109. Condemnation of right to take water. Any and all irrigating-ditch and canal companies which have been heretofore organized or incorporated, or which may hereafter become organized and incorporated, for the purpose of procuring or furnishing water for the purposes of irrigation, which shall desire to condemn the right to take such water from any stream in the state of Kansas, shall have the right to procure such condemnation for such purpose in the following manner. (L. 1889, ch. 165, p. 1; March 27.)

"42-110. "Petition to district court; appointment of commissioners.

"42-111. Notice by such commissioners.

"42-112. Assessment of damages.

"42-113. Report of commissioners.

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"42-121. Water rights and shares in irrigation companies.

"42-122. Offenses affecting works.

"42-316. Right of way and site for works for diverting, storing or conveying water.

"42-317. Condemnation of lands for site or way.

"42-101. Right to use of running water. The right

to the use of running water flowing in a river or stream in this state, for the purposes of irrigation, may be acquired by appropriation. As between appropriators, the one first in time is the first in right. (L. 1886, ch. 115, p. 1; Feb. 26.)

"42-102. Change of place of diversion. Any person, company or corporation entitled to the use of water may change the place of diversion, if others are not injured by such change, and may extend the canal, ditch, flume or aqueduct by which the diversion is made to places beyond that to where the first use was made. (L. 1886, ch. 115, p. 2; Feb. 26.)

"42-103. Notice at point of diversion. Any person, company or corporation desiring hereafter to appropriate water must post a notice in writing at a conspicuous place at the point of diversion, stating therein: *First*, That such person, company or corporation claims the water there flowing to the extent of——— (giving the number of) cubic feet per second, and describing and defining as accurately as may be the place of diversion; *second*, the means by which such person, company or corporation intends to divert it, and the size of the canal, ditch or flume or aqueduct in which he intends to divert it. A copy of such notice, together with proof of the posting thereof, must, within ten days after it is posted at the place of diversion, be filed in the office of the register of deeds of the county in which such place of diversion is situated, and be recorded by such register of deeds in a book to be kept for that purpose. (Revised, 1923; old sections, L. 1886, ch. 115, p. 3; L. 1891, ch. 133, art. 8, p. 25.)

"42-104. Time within which claimant must commence works for appropriation. Within six months after the notice is posted, the claimant must commence

the excavation or construction of the works in which such claimant intends to divert the water and must prosecute the work diligently and uninterruptedly to completion, unless interrupted by stress of weather or other unavoidable circumstance. By compliance with the above the claimant's right to the use of the water relates back to the time the notice was posted. A failure to comply with the above conditions shall deprive the claimant of the right to use of the water as against the subsequent claimant who complies therewith: *Provided*, That in any case wherein such notice has already been posted and the said sixty days has not yet expired the party or parties posting said notice, or their grantees or assigns shall have six months from the taking effect of this act within which to commence the excavation or construction of the works as herein provided. (L. 1886, ch. 115, p. 4; L. 1911, ch. 216, p. 1; Jan. 27.)

"42-105. Recordation of notices. The register of deeds of each county where water is appropriated for the purpose of irrigating lands shall keep a book in which he shall record the notices provided for in this act, together with verified proof of the posting thereof. (Revised, 1923; old section, L. 1886, ch. 115, p. 5.)

"42-106. Works prior to 1884. Where any canal ditch, flume or aqueduct which is the property of any individual, company, or corporation, and is used for the purpose of irrigating lands, has been located or constructed on or over any tract of land with the knowledge or consent of the owner of such lands, or upon or over any tract of land owned by the United States, and prior to the occupation of the same by any settler for the purpose of entry under any act of con-

gress, such location and construction shall be prima facie evidence that the same was rightful; and such canal, ditch, flume or aqueduct shall be deemed and held to come within the provisions and protection of section one of chapter one hundred and thirty-four of the Session Laws of eighteen hundred and eighty-five: Provided, however, That such canal, ditch, flume or aqueduct shall have been constructed for a period of at least two years prior to the first day of January, A. D. eighteen hundred and eighty-six. (L. 1886, ch. 115, p. 6; Feb. 26.)

"42-107. Construction of work on or over unoccupied lands.

"42-108. Measure of damages for right of way.

"42-301. Diversion and appropriation of natural waters west of ninety-ninth meridian. In all that portion of the state of Kansas situated west of the ninety-ninth meridian, all natural waters, whether standing or running, and whether surface or subterranean, shall be devoted, first, to purposes of irrigation in aid of agriculture, subject to ordinary domestic uses; and secondly, to other industrial purposes; and may be diverted from natural beds, basins or channels for such purposes and uses: *Provided,* That no such diversion shall interfere with, diminish or divest any prior vested right of appropriation for the same or a higher purpose than that for which such diversion is sought to be made, without the due legal condemnation of and compensation for the same; and natural lakes and ponds of surface water, having no outlet, shall be deemed parcel of the lands whereon the same may be situate, and only the proprietors of such lands shall be entitled to draw off or appropriate the same. (L. 1891, ch. 133, art. 1, p. 1; May 20.)

"42-302. Extent of appropriation; residue of waters. The appropriation of water hereafter shall in every case be deemed and be taken to be accomplished and effectual only as to so much water as shall have been actually applied to beneficial uses within a reasonable time after the commencement of the works by means of which such appropriation is intended to be made, or afterwards where no appropriation has in the meantime been initiated by others, together with the reasonable amount necessary to supply losses by waste, seepage and evaporation; all the residue of the water within the capacity of the canal or other works shall be deemed to be derelict, and liable to appropriation by any subsequent appropriator. (L. 1891, ch. 133, art. 1, p. 2; May 20.)

"42-303. Right to conduct water along natural channels and withdraw same. Any person may conduct water into and along any of the natural streams or channels of the state, and may withdraw all such waters so by him turned into such channel at any point desired, without regard to prior appropriations of water from said stream, due allowance being made for evaporation and seepage. (L. 1891, ch. 133, art. 1, p. 3; May 20.)

"42-304. Change of natural channel so as to prevent inflow into ditch or conduit.

"42-310. Right to continuance of use of water procured from carrier by contract.

"42-311. Right to take water for domestic uses.

"42-312. Such person responsible for injury or pollution.

"42-313. Right to collect and store water. Any person entitled to the use of water for the irrigation of lands or other purposes whatsoever may, at any time

while so entitled to the use thereof, collect and store the same up for use presently thereafter; and the failure to apply or use such waters during the period of such collection and storage shall not be deemed or taken to impair his right in that behalf. .(L. 1891, ch. 133, art. 2, p. 4; May 20.)

"42-314. Abandonment of right to use or enjoyment of water.

"42-315. Right of use of water subject to eminent domain.

"42-321 to 42-329, inclusive, pertain to the construction, operation and maintenance of irrigation works.

"42-329. Distribution of water at source of supply among proprietors of works. The waters of the several streams and sources of supply shall be distributed among the several canals, ditches, conduits and other works so that the proprietors of each of said works, and those entitled to water therefrom, shall, as nearly as may be, and to the extent of their needs, at all times receive and enjoy the waters to which they are severally entitled; and whenever it shall appear that there is flowing into any such works, water to which the proprietor of any other such works having a prior right is entitled, and that such other works having priority of right is not receiving the water necessary for the consumers of water therefrom, and which ought to flow to the same, the head gate of such works having the excess, and being subsequent in right, shall be closed or partly closed, so that a sufficient amount of water of such stream or source of supply may pass and flow to the said works having the priority of right, to the amount to which the same shall be entitled; and if the proprietors of any such works having such excess and being subsequent in

right shall fail or refuse to turn out such supply of water when requested by the party entitled to receive the same so to do, the head gate or waste gate of the works receiving such excess shall be so set and locked by the officer authorized by law to perform such duty as to permit a sufficient amount of said water to pass and flow to the party having the right to receive the same. (L. 1891, ch. 133, art. 4, p. 9; May 20.)

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